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Fact Sheet on Adoption Information Disclosure

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Introduction

Bill 183, the *Adoption Information Disclosure Act, 2005,* was introduced in the Ontario Legislature on March 29, 2005 and passed second reading on May 3, 2005. If passed, this Bill will generally provide adopted persons and birth parents with a right of access to each other's personally identifying information contained in adoption-related records.

One of the mandates of the Information and Privacy Commissioner of Ontario (the IPC) is to comment on the privacy implications of proposed legislation.[1] In this regard, the Ministry of Community and Social Services asked us to provide our views on Bill 183.

Although we are generally in favour of the proposed openness with respect to personal information concerning adoptions, we have serious concerns about certain aspects of the retroactive application of the proposed law. On May 18, 2005, these concerns were expressed to the Standing Committee on Social Policy. Our written submission to the Committee dated May 16, 2005 may be found on our website. As a solution which achieves a fair balance between access and privacy rights in this context, we have proposed the introduction of a disclosure veto which would give parties to past adoptions the right to prevent release of their identifying information. The disclosure veto would only apply retroactively.

Over the past weeks, we have continued to speak out about Bill 183 in accordance with our legislated mandate, and on behalf of the many birth parents and adopted persons who have asked us to do so as they **cannot come forward for fear of disclosing their identities**. They have asked us to speak on their behalf. The public debate has recently focused attention on particular issues of interest. This fact sheet is intended to address these issues, clarify certain misconceptions, and provide an update on the review of the research we have undertaken concerning this issue.

A history of privacy and confidentiality

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Recently, there has been renewed discussion about whether parties to adoption were in fact given assurances of confidentiality. Many contend that there were no **written** guarantees of confidentiality and have advised that they were never promised privacy.

However, there is clear evidence based on the correspondence, e-mails and telephone calls we have received, that many birth parents **were** in fact explicitly promised confidentiality and privacy [Submission, pages 3-6]. Many state that they were given the government's assurances through children's aid societies, social workers, or the courts. Moreover, a social worker who worked for 35 years with a children's aid society, confirmed that assurances of confidentiality were routinely given to birth parents. In characterizing these assurances, she stated, "our word was our bond" and said that it was "with shock and dismay" that she was witnessing a change in the adoption disclosure law that would reveal a birth mother's identity.

More recent correspondence confirms that some individuals have expectations of privacy based on these assurances, as the following selection of excerpts illustrates:

> We gave up our children for adoption decades ago with the promise that the files containing our identifying information would remain sealed... I was promised this in a courtroom before a judge, represented by a lawyer... So when I was promised this while on the stand in this courtroom surrounded by people more learned than me, was I supposed to know that this promise had no legal basis and would be discarded so willingly by your government decades later?
>
> ...
>
> I was guaranteed in 1965 that all documents would be sealed... I gave up all my rights [to my child]... and have lived with my decision for the past forty years.
>
> ...
>
> I was told forty years ago that these records were sealed and have lived my life accordingly.

These are but a few excerpts from the many letters and e-mails received opposing Bill 183. Moreover, **adopted persons** have also written in and stated that they too have lived with expectations of privacy and confidentiality and wish to have those expectations upheld. Here is one quote from an adopted person on this subject:

> My final comment is that I am not self-important enough to believe that I am speaking on behalf of all adoptees. I appreciate it is a difficult issue and there are varying views and opinions surrounding it. I am, however, dismayed that [those] who spearheaded this Bill, are trying to do just that and speak for all of those involved. Simply because [some birth mothers] who gave a child up for adoption and apparently [have] had a successful reunification, had such an experience, that does *not* give [them] the right to speak for me. Just as there are some adoptees who will want to find out more information about who gave birth to them, I, and countless others that I have spoken to, are happy with *our* families and do not wish to partake in this procedure. The only way to protect my rights is to provide me with an absolute right to veto disclosure of my information; for whatever reason I choose…

Two adopted persons have actually retained counsel and have indicated that they will be launching legal action in the form of a constitutional challenge to protect their right to privacy, should Bill 183 pass in its current form without a disclosure veto.

Confidentiality and statutory framework

It has been suggested that there is no law guaranteeing the confidentiality of adoption records. Consider the following:

While addressing a 2001 adoption information disclosure Bill, the Ontario Association of Children's Aid Societies submitted that from the time of the *Adoption Act* of 1927 until 1979, "adoption records were sealed" and all parties in the adoption process were "guaranteed secrecy."[2] It is important to note that from the introduction of the Adoption Disclosure Register in 1979 until today, identifying information from the adoption record can only be disclosed with the mutual consent of both parties[3] or by direction of the Registrar in circumstances such as

where required for the health, safety or welfare of an individual or by direction of the Court.[4]

Current legislation requires that original birth registrations are sealed.[5] The adoption order is provided to adoptive parents by the Court. A copy of the order may only be disclosed to an adopted person by order of the Court or by the Registrar of Adoption Information at her discretion.[6] Accordingly, the current statutory framework reinforces the confidential treatment of these records.

Further, Ontario courts have also recognized the confidential nature of the identifying information in adoption records. For example, in 1983, the Ontario Court of Appeal dismissed an adopted person's request for access to the records showing the identity of her birth parents. In doing so, the Court said that "... the Ontario legislation ... does provide for confidentiality to all three parties and it must therefore, follow that an order is not to be issued simply upon the demand of one of the parties."[7]

Confidentiality and adoption orders

Some people have contended that any assurances of confidentiality made to birth parents were invalid because their surnames were recorded on adoption orders.

It is important to recall that, unlike most court proceedings which are held in open court, legislation requires that adoption hearings must be held in private[8] and the court records in the application for adoption are shielded from disclosure to the public.[9] Of course, the Courts maintain a full record of the proceedings, including a record of the identifying information, under court seal. However, the identifying information has not always appeared on the face of court issued adoption orders.

The Ministry of Community and Social Services currently describes adoption order drafting practices as follows:

> For most adoptions prior to the mid-1960s, the Adoption Order will contain the adopted person's given name(s) and surname at birth. For many orders made after the mid-1960s, the adopted person's surname at birth is not shown. Instead,

> the first initial of the surname is shown, followed by the birth registration number.
>
> ... Adoption orders do not contain the names of the birth parent(s) or any information about them.[10]

We have recently been informed by the Registrar of Adoption Information that the practice of omitting the child's original birth name has been variable, with changes from time to time so that not all adoption orders omit the child's birth surname. From December 2002, the Family Law Rules of Court require the inclusion in the order of the child's birth name, unless the court orders otherwise.[11] The names of the birth parents are not currently included on the adoption order.

We have also been provided with a copy of the Ministry's 1995 internal Policy with respect to the disclosure of adoption orders. This Policy replaces a 1988 internal Disclosure Policy. The latter provided listed criteria for the disclosure by the Registrar of adoption records. Where the birth surname of the child was on the order, the adult adoptee was only given the adoption order where the original name was already known to him or her. In the case of minor adoptees, the original name was required to be known and health, safety or welfare concerns must be engaged.[12] Under the 1995 Policy, the criteria for the release of adoption orders changed – the requirement for prior knowledge of the birth surname was omitted, and one criterion was applied – that of harm to an individual. Where the birth surname is not included in the order, the order will not be altered to insert it, and the surname will not be given out in this context.[13]

In conclusion, adoption orders are drafted within a regime premised on private hearings, the sealing of court records, and the maintenance of the confidentiality protections provided for in the statutory framework. Finally, the fact that some orders include the birth surname of an adopted child and that some of these orders may have been released to adopted persons does not negate the statutory framework, promises of confidentiality or the legal expectations of privacy arising from those promises.

Accessibility of anonymized medical information

Many have contended that a disclosure veto will preclude the disclosure of anonymized medical information. This is not true and was never reflected in our position.

In cases where disclosure vetoes are filed, the IPC fully supports the provision of anonymized medical, genetic and family history information which does not identify the person about whom information is being provided, and has drafted a proposed amendment to address this issue. [See Submission, Appendix A].

Medical information will be no less accessible where disclosure vetoes are filed than under the contact veto process proposed in Bill 183.

There are no absolutes

Just as there is no absolute right to privacy, there is no absolute right to access.

The United Nations *Convention on the Rights of the Child*

Some who support Bill 183 contend that they have an unqualified right of access to the identifying information of other individuals.

In support of this view, some argue that Article 7 of the United Nations *Convention on the Rights of the Child* (the *Convention*) provides an unqualified right of access to birth parents' identifying information. This is incorrect. Upon reading the *Convention*, it becomes clear that it recognizes that the right of access is a qualified right.

Article 7 of the *Convention* provides that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know** and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this

field, in particular where the child would otherwise be stateless.

As noted above, Article 7 of the *Convention* provides children with a **qualified** right to know one's parents: "The child ... shall have ... *as far as possible*, the right to know ... his or her parents." (Emphasis added here and above).

Moreover, Article 7 recognizes that the "right to know" must be implemented in accordance with Canadian law. In Canada, laws affecting the rights of all parties to adoption must be grounded in our heritage and in accordance with the Canadian Constitution, including the *Charter of Rights and Freedoms* (the *Charter*).

While the experience of other countries may be instructive to Canadian lawmakers, it is not determinative of Canadian law or policy. This is true whether the issue is adoption disclosure, health care, or foreign policy.

Under the *Charter*, rights must be weighed and balanced against competing rights, values, and interests. In prioritizing one value or right, the *Charter* requires that we impair the countervailing right as little as possible. In effect, our constitution rejects absolutes.

The Canadian Context

Canadian courts have addressed the balance between protecting privacy and the disclosure of birth-related information in two recent cases.

A.P. v. L.D.

In *A.P. v. L.D.*[14], the Quebec Court of Appeal upheld a lower court order compelling a man to submit to a DNA paternity test. In pursuit of child support, a boy and his biological mother had presented evidence to show that the man was likely the boy's biological father. The Court held that it was "indisputable that forcing a person to undergo a DNA test constitutes prejudice" to his "integrity" - the Quebec *Charter's* equivalent of the Canadian *Charter's* right to "security of the person."

In prioritizing the child's interests in the particular circumstances of the case, the Court was careful to observe that, in the wider context, competing and vital interests are also at stake:

> Certainly, the child's right to know his or her parents is not absolute – which is also the case for other rights. In the first place, the *Convention on the Rights of the Child* is itself somewhat qualifying when defining "to the maximum extent possible." Furthermore, one can think of certain conflictual situations in the field of adoption where biological parents would not want their identities to be disclosed. (*A.P. v. L.D.*, at para 38.)

Pringle v. Alberta

Prior to November 1, 2004, Alberta had a consent-based adoption disclosure system that is very similar to the system currently in place in Ontario. In a recent case, *Pringle v. Alberta (Human Rights, Multiculturalism and Citizenship Commission)*[15] (*Pringle*), an adopted person who was denied access to birth registration information challenged this legislation on the basis that it violated Alberta's human rights legislation and the equality guarantee in section 15(1) of the *Charter*.

In upholding the constitutionality of the law, the Alberta Court of Queen's Bench ruled that the legislation was a rational and proportionate measure designed to accomplish a pressing and substantial objective, namely "honouring the assurances and expectations of privacy or confidentiality on which birth parents have relied." Indeed, the Court concluded that the system in Alberta was consistent with both the Canadian *Charter* and the UN *Convention*. The Court also indicated that Alberta's newly enacted system – an open system with a disclosure veto – is constitutional.

A Canadian Approach

The UN Committee on the Rights of the Child recently recommended that governments in Canada "consider amending … legislation to ensure that information about the date and place of birth of adopted children and their biological birth parents are preserved and made available to these children." This recommendation speaks to a general principle. The Convention requires that each country adapt and apply it in accordance with its own domestic laws.

Some Canadian provinces have already taken steps to ensure greater openness to adoption records, and Ontario is actively considering legislation that would move us in this direction. However, no other province in Canada has introduced adoption disclosure laws that provide

the kind of unqualified retroactive access that Ontario is now proposing. Even in British Columbia, Alberta and Newfoundland and Labrador (Newfoundland), the only three provinces where adoption disclosure legislation was applied retroactively, disclosure vetoes have been made available for parties who entered into the adoption process before the introduction of these laws. The remaining provinces and territories require consent. Even where Manitoba and Saskatchewan moved to a more open disclosure process, a consent-based approach for past adoptions remained in place.

By introducing a disclosure veto, British Columbia, Alberta and Newfoundland have enabled the vast majority of adopted persons and birth parents to have access to identifying information, while protecting the rights of a minority of birth parents and adopted persons who still wished to maintain their privacy.

Based on the experiences of British Columbia and Alberta, only three to five per cent of birth parents and adopted persons actually file a disclosure veto. This suggests that with an Ontario disclosure veto, 95 to 97 per cent of birth parents and adopted persons would be expected to be able to access their birth records and adoption orders.

In our view, a disclosure veto for past adoptions represents a principled and balanced approach appropriate to the competing interests and the Canadian context. We must strike a fair balance.

The *Freedom of Information and Protection of Privacy Act*

It has been suggested that if the *Freedom of Information and Protection of Privacy Act* (the *Act*) were to apply to personally identifying information relating to parties to adoption, adopted persons would have an unqualified right of access to personally identifiable information about their birth parents. This is a misreading of the *Act*.

The "Freedom of Information" part of the *Act* applies to requests for *general records*, that is, where a requester is **not** seeking access to his or her own personal information. FOI requests may include government records such as policy decisions, administrative matters, budgetary matters, etc.

Unlike requests for general records, requests for one's own personal information are processed under the privacy protection provisions of Part III of the *Act*. Access to one's own personal information is a privacy right, but again, not an unqualified one. For example, under section 49(b) of the *Act,* an institution may deny access to one's personal information where its disclosure would constitute an unjustified invasion of another individual's personal privacy.

Accordingly, where a record contains mixed personal information, the *Act* requires that government institutions consider severing the personal information of other individuals prior to releasing the remaining information relating to the requester. This has been the practice over the years under Ontario's access and privacy legislation.

In British Columbia, where some adoption records fall under their *Freedom of Information and Protection of Privacy Act,* the Commissioner held that it would be an unreasonable invasion of a birth mother's privacy to disclose her surname to an adopted person. (see Order 35-1995, *British Columbia (Ministry of Social Services)*, [1995] B.C.I.P.C.D. No. 7).

Limitations of contact vetoes

Under Bill 183, even where a contact veto is filed, an individual's identifying information will in fact be disclosed.

In addition, Bill 183 does not prohibit the secondary disclosure of identifying information to other individuals. Accordingly, there may be nothing to prevent widespread disclosure of this personal information.

Further, the disclosure of identifying information may be especially problematic for individuals living in smaller communities where they can be more readily identified and located. Even with the option of a contact veto, one adopted person living in a smaller community whose birth mother had been searching for her advised us that she would worry about being watched:

> … [one] can do a lot of things without having 'contact,' such as driving past my house, and watching me from a distance. I shouldn't have to look over my shoulder for the rest of my life.

Moreover, there does not appear to be any research that looks at those who refrained from reporting violations of contact vetoes. Individuals, especially some birth parents, may be reluctant to come forward for fear of having to self-identify to the authorities, or may wish to avoid taking legal action against their own birth kin by reporting them to the police.

While we are aware that there have been some complaints that contact vetoes have been breached in New South Wales and in Tennessee,[16] we are not aware of *any* jurisdictions that have formal mechanisms to report or track veto violations.

The Canadian Experience

Some supporters of Bill 183 have pointed to the absence of reports about contact veto violations in Canada as an indication of their effectiveness. However, i n provinces with contact vetoes (British Columbia, Newfoundland and in Alberta, contact preferences), few contact vetoes or preferences have been filed. In fact, the vast majority of concerned individuals opt for the greater protections offered by a disclosure veto.[17] Moreover, in British Columbia, which opened its adoption records in 1996, there has been no formal mechanism through which individuals can report contact veto violations, or a means by which the government can track them. In Alberta, no contact preferences have been filed to date, and very few contact vetoes have been filed in Newfoundland. Accordingly, the limited experience of these provinces with contact vetoes cannot be relied upon to suggest that they are effective. In each case, these provinces have also offered disclosure vetoes, which have been used far more widely.

It is also noteworthy that, in *Pringle* (described above), the Alberta Court of Queen's Bench ruled that "contact preferences" (including a no-contact preference) would fail to honour assurances of confidentiality.

In this regard, the comments of one adopted person who wrote to the IPC are instructive:

> The fact that I may be able to place a 'no-contact' order on the person who receives the disclosure as my 'birth parent' completely misses the point. The issue isn't whether someone will show up at my door purporting to be my parent … The bigger issue is that the government *has no right* to disclose this information in the first place…

Research on adoption disclosure

Advocates for the unconditional disclosure of adoption records have suggested that adoption disclosure research, both in Canada and abroad, conclusively demonstrates that the retroactive disclosure of adoption records does no harm -- contact vetoes are effective while disclosure vetoes are hurtful and punitive. However, many researchers have noted the methodological shortcomings of the research in this area and the limitations on any conclusions that may be drawn. The IPC is currently in the process of undertaking an extensive review of the literature on adoption disclosure.

A preliminary review of the literature indicates that there has been no comprehensive, systematic, longitudinal research on the impact of the disclosure of adoption information, contact vetoes or disclosure vetoes, using **representative samples** of adopted persons, birth parents and adoptive parents. Further, we are unaware of any jurisdiction that has a mechanism in place to systematically track and evaluate the effects of disclosure, contact vetoes and disclosure vetoes on adopted persons, birth parents and adoptive parents. In the absence of such evaluation and research, we simply do not know the real impact. Thus, claims of the resounding success of contact vetoes cannot be relied upon.

Much of the research conducted has been methodologically flawed using samples of self-selected individuals, often recruited from adoption support groups and websites that advocate search and reunion and lobby for adoption disclosure legislation. Such research is subject to systematic selection bias. In addition, some of the research has been conducted by adoption disclosure advocates, raising questions of researcher bias. Due to the potential for selection bias and researcher bias, extreme caution must be exercised in drawing any conclusions from the existing research.

Researchers have acknowledged that individuals who have suffered harm or had adverse experiences from disclosure may be less likely than others to participate in research and to report privacy violations, thereby risking further exposure of their personal information. Researchers have also pointed out that adopted persons and birth parents who are not interested in search and reunion may have little interest in participating in such research. Consequently, the findings, which are based on a limited segment of the population, cannot be generalized to the entire population of adopted persons, birth parents and adoptive

parents.

The limited research that has been conducted using **random** samples of adopted persons, either when they were obtaining information or shortly thereafter, only provides information about the early experiences of disclosure and provides little information about the short-term or long-term effects on adopted persons, birth parents, and adoptive parents. In particular, it does not provide information about those individuals who do not wish to seek out information, but may be affected by its disclosure to others.

It is important to note that, in spite of the potential bias favouring positive outcomes, studies have consistently found a small but significant portion of individuals who were adversely affected by the disclosure of adoption information. There is also anecdotal evidence from other jurisdictions such as New South Wales and Tennessee to suggest that contact vetoes are sometimes violated and that some individuals who have been found by their biological relatives report suffering harm.[18]

A balanced approach

In our view, the retroactive application of proposed adoption disclosure legislation necessitates the inclusion of a disclosure veto to balance the rights of access and privacy. The inclusion of a disclosure veto would be consistent with legislation in ot her jurisdictions in Canada, including British Columbia, Alberta, and Newfoundland. (All the remaining provinces and territories in Canada require stronger forms of consent). Past assurances of confidentiality, reinforced by a legislative framework predicated on confidentiality, are critical factors that need to be taken into consideration when disclosing adoption records retroactively.

In addition, the methodological shortcomings of the existing research preclude definitive statements about the impact of contact vetoes and the disclosure of personally identifying information on adopted persons, birth parents and adoptive parents. In the absence of systematic unbiased research, it is not known the extent to which the disclosure of adoption information will result in harm to at least some individuals. Anecdotally, however, the letters and e-mails we have received from birth parents and adopted persons indicate quite clearly that harm will result to many individuals if their identifying information is released against their

wishes. Accordingly, it would not be prudent to disregard concerns about potential harm resulting from the application of Bill 183.

Finally, requiring individuals to persuade a tribunal that disclosure of personally identifying information will result in significant harm, as the Bill currently proposes, does not address concerns relating to personal privacy and dignity. Individuals must be provided with the right to choose to protect their personal and confidential information – no questions asked. To quote from one adopted person who does not wish to have his identifying information released, "the disclosure **is** the harm." For these reasons, to have to appear before a tribunal to plead one's case for privacy is an inadequate solution.

Notes

1. See section 59(a) of the *Freedom of Information and Protection of Privacy Act*.
2. *Submission to the Standing Committee on General Government Regarding Bill 77: Adoption Disclosure Law Amendment Act, 2001* by the Ontario Association of Children's Aid Societies dated November 7, 2001. See pages 1 and 6.
3. Under section 167 of the *Child and Family Services Act*, R.S.O. 1990, c.C.11 (*CFSA*) adoption disclosure register .
4. Under section 168 of the *Child and Family Services Act*, the Registrar may disclose identifying or non-identifying information where required to protect a person's health, safety or welfare. In addition, under section 162(2), a court may, order adoption records open for inspection. .
5. Section 28(2) of the *Vital Statistics Act* R.S.O 1990 C.V.-4 – the original birth registration is withdrawn from the registration files, kept in a separate place and sealed. In addition all documents relating to adoption applications are sealed under section 162(2) of the *CFSA*.
6. Sections 162(2) and 165(2)(g)(ii) of the *CFSA*.
7. *Ferguson v. Ontario (Director of Child Welfare)* (1983), 44 O.R. (2d) 78 (C.A.)
8. S.151(1) *Child and Family Services Act*.
9. S. 151(2) *Child and Family Services Act*
10. http://www.cfcs.gov.on.ca/cfcs/en/programs/scs/adoptionsearch/publications/adoptreg.htm#AdoptionOrder
11. Rule 34(1)(2.1)(b) Family Law Rules, O. reg. 337/02 s.3 under the *Courts of Justice Act*.

12. Adoption Information Disclosure, Policy and Guidelines, Ministry of Commuity and Social Services, February 1988.

13. Adoption Disclosure Guidelines, Ministry of Community and Social Services, November 1, 1995.

14. (2000), 195 D.L.R. (4 th) 354 (Que. C.A.)

15. [2004] A.J. No. 1394 (Q.B.)

16. New South Wales Law Reform Commission, *Report 69 (1992) – Review of the Adoption Information Act 1990: Summary Report*, paragraph 4.14, reported one breach of a contact veto. My staff were also advised that there have been some informal complaints that contact vetoes have been violated.

    In Tennessee, the law generally permits an adopted person to access his/her adoption file. However, before handing the file over, the adopted person must sign a statement that he/she will not contact individuals in the record **without** their consent. The State then conducts a search for individuals and sends them a form asking if they want contact. We were informed that there have been some informal complaints/incidents where contact vetoes have been violated both pending searches and after a veto has been received.

17. In British Columbia, as of February 17, 2005, only 333 contact vetoes have been filed vs. 3,085 disclosure vetoes. In Newfoundland, as of May 3, 2005, approximately 20 contact vetoes have been filed vs. approximately 480 disclosure vetoes. In Alberta, contact preferences can only be filed for adoptions that take place after January 1, 2005 and none have been filed to date.

18. See footnote 11. See also: New South Wales Law Reform Commission, *Report 69 (1992) – Review of the Adoption Information Act 1990. Appendix B – Report: Survey and Qualitative Research*. See for example, sections on "Reunion Experiences" at paragraph 5.161 and on; "Impact of Contact Vetoes" at 5.173 and on.

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